Supreme Court, U.S.
FILED
04114 0 FEB 23 2005
OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL P. MALAKOFF
JAMES M. PIETZ
MALAKOFF, DOYLE,
& FINBERG, P.C.
Frick Bldg,, Ste. 200
Pittsburgh, PA 15219
(412) 281-8400

SAM HELDMAN *
GARDNER, MIDDLEBROOKS
2805 31st St., NW
Washington, DC 20008
(202) 965-8885

* Counsel of Record
for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a removed case to state court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	3
1. This Court has settled similar questions under other statutes	3
2. The Circuits are divided into at least two camps; and the District Courts are using various standards	6
3. The correct standard would require a fee award in this case	10
4. The question calls out for an answer; and the answer will materially affect the workload of the federal judiciary	13
5. This case is an appropriate one in which to resolve the question	15
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Ansley v. Ameriquest Mortgage Co., 340 F.3d 858 (9th Cir. 2003) 8
Arnold v. Philip Morris USA, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 15390 (S.D. Ill. 2004) 9
Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102 (9th Cir. 2000) 8
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) ..... *passim*
Dixon v. Coburg Dairy, 369 F.3d 811 (4th Cir. 2004) (en banc) 12
Fogerty v. Fantasy, 510 U.S. 517 (1994) 5
Gray v. New York Life Ins. Co., 906 F.Supp. 628 (N.D. Ala. 1995) 9
Hart v. Wal-Mart Stores, 360 F.3d 674 (7th Cir. 2004) 9
Hornbuckle v. State Farm Lloyds, 385 F.3d 538 (5th Cir. 2004) 7
JK&E Partnership v. Chase Manhattan Bank, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 587 (E.D.N.Y. 2004) 9
Johnson v. Port of Seattle, 261 F.Supp.2d 1243 (W.D. Wash. 2003) 9
Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001) 2
Martin v. Franklin Capital Corp., 393 F.3d 1143 (10th Cir. 2004) 1, 3, 8
Mints v. Educational Testing Service, 99 F.3d 1253 (3rd Cir. 1996) 5
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) ..... *passim*
Roxbury Condominium Ass'n v. Anthony S. Cupo Agency, 316 F.3d 224 (3rd Cir. 2003) 7

TABLE OF AUTHORITIES—Continued

Page

Sirotsky v. New York Stock Exchange, 347 F.3d 985 (7th Cir. 2003) 9
Suder v. Blue Circle, 116 F.3d 1351 (10th Cir. 1997) 5, 8
Tank v. Chorister, 160 F.3d 597 (10th Cir. 1998) .. 11
Tenner v. Zurek, 168 F.3d 328 (7th Cir. 1999) 5
Valdes v. Wal-Mart, 199 F.3d 290 (5th Cir. 2000) 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 2
28 U.S.C. § 1447(c) ..... *passim*
Fed. R. Civ. P. 11 12
Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123 (2003) 10, 13-14

IN THE

Supreme Court of the United States

No. __

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Gerald T. and Juana M. Martin respectfully pray that a writ of certiorari issue to review the decision and judgment of the U.S. Court of Appeals for the Tenth Circuit, *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir., December 30, 2004).

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, reported at 393 F.3d 1143, is reproduced in Appendix A [1a-13a]. The order of the U.S. District Court for the District of New Mexico, which the Tenth Circuit affirmed, is reproduced in Appendix B [14a-21a].

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below, affirming the denial of Petitioners' request for fees and expenses, was issued on December 30, 2004.

STATUTE INVOLVED

28 U.S.C. § 1447(c) provides, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

STATEMENT OF THE CASE

This is a consumer class action arising under state law, filed in New Mexico state court. Defendants removed the case to U.S. District Court for the District of New Mexico, on the basis of diversity jurisdiction. After some pretrial litigation, Plaintiffs (who are Petitioners in this Court) moved to remand for lack of jurisdiction, because the amount in controversy did not meet the statutory minimum under 28 U.S.C. § 1332. The District Court denied the motion to remand.

Plaintiffs asked the District Court to enter judgment against them so that they could seek review of the denial of their motion to remand. The District Court did so, and Plaintiffs appealed. The U.S. Court of Appeals for the Tenth Circuit held, on that appeal, that the case was not removable because the amount-in-controversy requirement for diversity jurisdiction was not met. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001) ("*Martin I*").

The case returned to the District Court with instructions that it remand the case to state court. Plaintiffs moved, under 28 U.S.C. § 1447(c), for an award of fees and expenses. The District Court denied that motion, based on its view that the removal (though ultimately found to be contrary to law) had not been "improper" in the sense of that word that would (in that court's view) justify a fee award. [19a-20a]. As the

Tenth Circuit described it, the District Court "determin[ed] that at the time defendants removed the case to federal court, they had objectively reasonable legal grounds to believe removal was proper." [3a].

The central question as to the propriety of removal had been whether punitive damages or attorney fees could be aggregated among all class members, or attributed *in toto* to the named plaintiffs, in order to meet the amount-in-controversy requirement. Though the Tenth Circuit held that defendants' theories in that regard lacked merit, at the time of the removal there had been some short-lived (and later-reversed) out-of-Circuit authority that supported defendant's argument. Defendants had been trying, unsuccessfully, to make new law to that effect in the Tenth Circuit.

Plaintiffs appealed the denial of fees and expenses. In the decision presently under review, the Tenth Circuit affirmed the decision as having been within the District Court's discretion. *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir. 2004) ("*Martin II*").

REASONS FOR GRANTING THE PETITION

The question presented in this case is simple, but it has never received a clear answer. The question is "What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a case to state court?" For the reasons explained herein, the question needs a clear answer, and a correct one.

1. This Court has settled similar questions under other statutes.

The statute says that a District Court "may" make a fee award when remanding a case.[1] That does not, under this

[1] At stake here is a request for attorneys' fees and expenses. For brevity's sake, the Petition will sometimes simply use the word "fees," but this should not be construed as abandoning the expenses.

Court's decisions, amount to a rule of pure discretion. This Court has interpreted other fee-shifting statutes that use similarly permissive language, always recognizing that such language does not mean that each District Court can use whatever standard it thinks is best. Instead, this Court has arrived at an appropriate legal standard to govern the District Courts' decisionmaking as to each sort of case, always focusing on the language of each statute and on the policy considerations at stake in each type of litigation. A district court has discretion when it comes to applying the governing standard to the particular case; but there is, still, a governing standard.

As to civil rights statutes, for instance, this Court has adopted strong presumptions and controlling definitions, which strictly guide the District Courts' discretion. A prevailing plaintiff *should* be awarded fees absent some extraordinary reason to the contrary. *See, e.g., Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (fees should ordinarily be awarded to prevailing plaintiff "unless special circumstances would render such an award unjust"). The reason, as explained in *Piggie Park*, is that this standard furthers the statutory goal of combating civil rights violations by encouraging plaintiffs to challenge such violations.[2]

On the other hand, this Court has held, under equally permissive language, that a prevailing *defendant* in a civil rights case can be awarded fees *only* if the plaintiff's claim was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). As with *Piggie Park*, this difficult-to-meet standard for fee awards was based on this Court's understanding of what the Congress meant to encourage, and what it meant to discourage, by allowing for fee awards in such cases. The Court

[2] Though *Piggie Park* dealt with a particular civil rights statute, the same rule has since been applied to a broader range of such statutes, as well as certain statutes in other areas such as environmental law.

adopted the stringent *Christiansburg Garment* standard so as (in part) not to over-deter potential civil rights plaintiffs by the prospect of fee awards, given the Congressional desire that civil rights violations be challenged through litigation. *Id.*

Even when dealing with a different statute that (because of the relevant policy considerations) is read differently, this Court has still not interpreted permissive fee-shifting language as a grant of pure discretion. Thus, in regard to the Copyright Act, this Court has held that District Courts should apply neither the *Piggie Park* presumption in favor of an award, nor the *Christiansburg Garment* presumption against an award. But even then, the Court has not left the District Courts without guidance on the standard that they should apply; it has set out some factors that the trial courts may consider in deciding whether to award fees. *Fogerty v. Fantasy*, 510 U.S. 517, 534 n. 19 (1994) (Copyright Act).

Just as this Court has guided the lower courts in fee disputes under those other statutes, the Court should do the same with § 1447(c). As in the other cases, this Court will be guided by the relevant policy considerations that animated the enactment of the fee-shifting language. Section 1447(c)'s fee-shifting language was adopted in 1988 as part of the Judicial Improvements Act. Until that time, there had been no express authorization for a fee award upon the remand of a case to state court. In the absence of such language, courts held that fees could be awarded only if the case had been removed in "bad faith." The addition of express fee-shifting language, it is widely recognized, was designed to make fee awards available more broadly, without a showing of bad faith. *See, e.g., Tenner v. Zurek*, 168 F.3d 328, 329-30 (7th Cir. 1999); *Valdes v. Wal-Mart*, 199 F.3d 290, 292 (5th Cir. 2000); *Mints v. Educational Testing Service*, 99 F.3d 1253, 1260 (3rd Cir. 1996); *Suder v. Blue Circle*, 116 F.3d 1351, 1352 (10th Cir. 1997). A core purpose of this statutory

change, it should be uncontroversial to note, was to alleviate some of the pressure of the workload of the federal bench, by deterring inappropriate removals and by encouraging plaintiffs to oppose them. As will be seen below, the decision of the Tenth Circuit in this case, like the decisions of many other lower courts as to the governing legal standard under § 1447(c), thwarts these purposes of the fee-shifting statute.

2. The Circuits are divided into at least two camps; and the District Courts are using various standards.

There is disagreement among the lower courts as to the applicable legal standard under § 1447(c). The Circuits are split into at least two camps; and the District Courts use varying standards as well.

There is general consensus as to one initial point: that the central factor to be considered is some type of assessment of the propriety of the removal. But this is only the barest beginning to a definition of the standard; for there is a spectrum of widely differing standards that could be encompassed within that general phrasing. The spectrum would include both a *Piggie Park*-like rule that fees *should* be awarded against the unsuccessful party absent some extraordinary reason to the contrary, and a *Christiansburg Garment*-like rule that fees *should not* be awarded against the unsuccessful party unless its removal had no reasonable foundation. Each of those diametrically opposed tests could be described, in a sense, as being based on an assessment of the propriety of the removal.

This, then, is the split among the lower courts: they have adopted widely differing standards from different points on that spectrum, ranging from something at or near the *Piggie Park* standard to something quite near, and perhaps identical to, the *Christiansburg Garment* standard. Even odder, some Circuits—like the Tenth Circuit, whose decision is under review here—overtly allow each District Court to choose for

itself, on a case-by-case basis, which of those extremes (or some other middle-ground standard) to apply.

The Fifth Circuit lies at one end of the wide spectrum, the end at which fee awards are most rare. That Court's standard is that a District Court can award fees *only* if the removal, beyond being incorrect, was unreasonable. *See, e.g., Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) ("Fees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'"). Third Circuit precedent can be read as utilizing the same standard. *Roxbury Condominium Ass'n v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3rd Cir. 2003) (holding, as an alternative ground for reversing fee award, that it was an abuse of discretion to award fees where the argument for removal was "colorable" and the relevant law was "unsettled"). This is quite close to, and indeed for practical purposes the same thing as, the *Christiansburg Garment* standard: a fee cannot be awarded against the losing party unless the party's litigation stance, beyond being incorrect, was actually unreasonable.[3]

These Circuits have thereby placed removing defendants in the same favored position, in terms of fee awards, as civil rights plaintiffs; the Circuits have protected them from fee awards unless they take a stance without reasonable basis. As will be seen below, this standard cannot be squared with the purposes, history or text of section 1447(c). It is implausible

[3] The *Christiansburg Garment* standard is "frivolous, unreasonable, or without foundation." 434 U.S. at 421. "Frivolous" and "without foundation" are, if anything, even worse than "unreasonable" in day-to-day legal parlance. To the extent that the three adjectives or phrases are not synonyms, then, "unreasonable" is ultimately the dividing line as to when fees can be awarded under *Christiansburg Garment*. That is why we say, here, that a standard that denies fees unless the removing defendant's position was unreasonable is, in essence, the *Christiansburg Garment* standard.

to suggest that the Congressional desire, in enacting § 1447(c) and thereby expanding the availability of fee awards in order to help alleviate docket crowding, was to *protect* all but the worst removing defendants.

In some other Circuits, each District Judge is free to set his or her own standard, as to how strong or weak the argument in favor of removal must have been in order to grant or deny fees. That is the effect of the Tenth Circuit's rule that a District Court *can* award fees even if the removal had a reasonable basis, but does not *have to* do so; the Circuit has left this up to each District Judge's discretion. *See Martin II*, 393 F.3d at ___, n. 3 (decision below, 6a) ("in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees. The decision is then reviewed for an abuse of discretion"); *Suder v. Blue Circle*, 116 F.3d 1351, 1352-53 (10th Cir. 1997) (district court *can* award fees even if the removal was colorable, and its decision will not be reversed unless the appellate court finds the removal actually to have been legally correct). So, it is simply up to the District Court, within its apparently unconstrained discretion, whether to use a *Piggie Park* standard, a *Christiansburg Garment* standard, or something in between. One District Judge can award fees as a matter of course upon remanding a case; the District Judge next door can decline to award fees unless the removal was plainly wrong. Also in this camp, it appears, is the Ninth Circuit. *See, e.g., Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858 (9th Cir. 2003) ("A court may award attorney fees when removal is wrong as a matter of law"); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 & n.6 (9th Cir. 2000) (discussing this discretion).[4]

[4] It is possible that the Tenth Circuit, or some others in this camp, would ultimately hold that fees *should* be awarded in a case where the removal had no reasonable basis whatsoever. But they differ from the Fifth Circuit by *allowing* a fee award even if there was a reasonable basis; yet they leave the decision in such instances entirely up to the District Court, with no particular guidance.

Other courts offer still further variations. For instance, in the Seventh Circuit a plaintiff is "presumptively" entitled to fees if a case is remanded, *e.g., Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004). It is unclear whether that presumption can be rebutted solely by a finding that the removal, even though incorrect, had a reasonable basis. *See Sirotsky v. New York Stock Exchange*, 347 F.3d 985, 987-90 (7th Cir. 2003) (affirming denial of fees, based on assertion that the propriety of removal was debatable as well as other case-specific factors). This, then, might mean no more and no less than the Tenth Circuit's pure-discretion formulation, including the right of a District Judge to use a *Christiansburg Garment*-like standard; or it might mean something different.

Faced with unconstrained discretion, some District Courts have in effect utilized a *Piggie Park*-like standard that makes fees a normal accompaniment to a remand. *See, e.g., Gray v. New York Life Ins. Co.*, 906 F.Supp. 628, 631 (N.D. Ala. 1995) ("A significant number of district courts have since 1988 routinely awarded attorney's fees under § 1447(c)"); *Arnold v. Philip Morris* USA, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 15390, *14-15 (S.D. Ill. 2004) (awarding fees based squarely on Seventh Circuit's presumption in favor of such an award, making clear that this was not a sanction); *Johnson v. Port of Seattle*, 261 F.Supp.2d 1243, 1246 (W.D. Wash. 2003) (offering the following as the entirety of its reasoning in support of decision to award fees: "Because removal of this case was wrong as a matter of law, the Court will award the unnecessary litigation costs imposed on plaintiff," *citing Balcorta, supra*). Others use some other standard that is somewhere between *Piggie Park* and *Christiansburg Garment*. *See, e.g., JK&E Partnership v. Chase Manhattan Bank*, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 587, *15-

16 (E.D.N.Y. 2004) (using the standard of "whether the grounds for removal were substantial or presented a close question"). Others, like the District Court in this case, have decided to utilize an "unreasonableness" test like the Fifth Circuit's. So, the lower courts are spread all across the spectrum from *Piggie Park* to *Christiansburg Garment*. The confusion must not be allowed to last.

3. The correct standard would require a fee award in this case.

The correct standard for fee awards under section 1447(c), we submit, is much like the *Piggie Park* standard: that upon remanding a case, a court *should* ordinarily award fees to the plaintiff, absent special circumstances—and the existence of a reasonable (though unsuccessful) argument in favor of removal does *not* amount to such a special circumstance. Or, at least, a court remanding a case *should* award fees to the plaintiff where the removal was an unsuccessful attempt to make law expanding the boundaries of federal removal jurisdiction, and where there is no special circumstance warranting a refusal of fees. Under such a standard, Petitioners would indisputably be entitled to a fee award in this case. There was no reason for the denial of fees in this case, except for the perception that there was a reasonable argument in favor of removal at the time defendants removed the case.

The propriety of a strong presumption in favor of a fee award upon remand—and the reasons for it—are explained well in Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123 (2003). As shown in that article, the text, history, purposes and policies of the statute all point towards a standard that would require a fee award except in unusual cases. This sort of case is much like *Piggie Park* in that regard.

Such a standard is supported by all the indications that the policy and purpose behind the 1988 enactment was to deter

inappropriate removals, to encourage plaintiffs to oppose them, and to compensate plaintiffs for them. For one thing, the statute—unlike many fee-shifting statutes—goes only in one direction. It does not allow a fee award to a defendant that successfully defends its removal; instead, it allows fees *only* to the party that opposed removal. This demonstrates that the idea was to reduce the number of removals. In addition, there is the fact that the fee-shifting language was part of a larger package of statutory changes designed (at least in large part) to restrict jurisdiction and reduce federal court workloads. *See Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998) ("The purpose of the [Judicial Improvements Act of 1988] was to reduce substantially the diversity jurisdiction of the federal courts. See H.R. Rep. No. 100-889, *reprinted in* 1988 U.S.C.C.A.N. 5982."). Again, this demonstrates that the idea was to reduce the number of removals.

So, as clearly as in the civil rights context that this Court faced in *Piggie Park*, the relevant policy considerations weigh wholeheartedly in favor of the plaintiff successfully opposing removal, and thus weigh in favor of a rule that a prevailing plaintiff *should* receive a fee award absent some special or extraordinary circumstances. Just as in *Piggie Park*, or even more so, the relevant policy considerations that the Congress sought to further through the fee-shifting language are one-sided. The Congress, in enacting the fee-shifting language along with the rest of the 1988 statutory package, was working to reduce the burden on federal court dockets. Unlike the copyright statute that the Court faced in *Fogerty*, it cannot be said in this case that the Congress was equally favorably disposed towards plaintiffs and defendants; only plaintiffs (the parties who oppose removals) were made eligible for fee awards in this context. The better understanding of the 1988 enactment is that the Congress had in mind the *Piggie Park* interpretation of the word "may" in the fee-shifting context.

At the very least, a correct standard would include the principle that the existence of a reasonable (though wrong) argument in favor of removal is not, in itself, sufficient reason to deny a fee award in this case. If a defendant can escape fee liability by showing merely that it had a reasonable argument, then the statute provides only negligible deterrence—if indeed any deterrence at all—of inappropriate removals, and thus fails to achieve its purpose to any material degree. After all, when this statutory language was adopted, Fed. R. Civ. P. 11 already allowed a fee award against a defendant that removed a case without a supportable argument; so there was no need to enact a new statute to deter *frivolous* removals. *Cf. Piggie Park*, 390 U.S. at 402 n.4 (statute cannot be read as allowing fees only in case of bad faith, as courts already had the authority to issue fee awards in such cases). And it is hard to imagine the existence of any defendant who could believe that its argument in favor of removal would pass Rule 11 muster, yet would believe that its argument was unreasonable (and so would forego the opportunity to try removal, for fear of a fee award under § 1447(c)). It is virtually impossible to imagine that the Congress enacted § 1447(c)'s fee-shifting language solely for the narrow purpose of deterring that tiny hypothetical set of would-be removers who thought their potential arguments fell in that thin range between frivolous and unreasonable. In summary, if the statute means that fees can be denied on the grounds that the defendant had a reasonable argument at its disposal, the fee-shifting aspect of the statute serves practically no purpose at all.

In further support of a rule favoring a fee award in cases like this one, there is this aspect of the underlying substantive law of removal jurisdiction: that the removal statutes are strictly construed, and all doubts about the existence of removal jurisdiction are to be resolved in favor of remand. *See, e.g., Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism con-

cerns' implicated. Therefore, 'if federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (bracketed material in original, citations omitted). In other words, under the substantive law, defendants *should not* remove cases based on novel contentions in an attempt to expand removal jurisdiction beyond its traditional limits. An argument in favor of removal should not be made merely because it is reasonably debatable; a case should not be removed if it is doubtful whether it is removable, because any such doubts must be resolved in favor of remand. A defendant that premises removal on a legal proposition of questionable validity, in order to create new law, has ignored this fundamental rule of removal law. There is, therefore, no reason to protect such a defendant; to say that the defendant's argument was not unreasonable, is in this context to damn it with faint praise. A rule making fee awards presumptively available, when a case is remanded, would be perfectly aligned with the underlying substantive law: it would force defendants to take seriously the rule requiring strict construction of the removal statutes.

4. The question calls out for an answer; and the answer will materially affect the workload of the federal judiciary.

As discussed in *Removal, Remand and Reimbursement*, the choice of the governing legal standard for fee awards under § 1447(c) will have a material impact on the workload of the federal judiciary. *See, e.g. Removal, Remand and Reimbursement*, 87 Marq. L. Rev. at 156. Indeed, a concern for the workload of the federal judiciary was the very reason why the Congress enacted § 1447(c) in its current version, making fee awards more available than they had been under former law. The idea was to deter removal of cases that do not fall within federal jurisdiction. That deterrence is weakened, when the prospect of a fee award becomes more unlikely or even just less predictable.

Removed cases make up a significant, and growing, portion of the civil docket of the District Courts. *See* Administrative Office of the U.S. Courts, "Judicial Business of the United States Courts, 2003," Supplemental Table S-7 (available at http://www.uscourts.gov/judbus2003/contents.html) (reflecting growth of percentage of civil cases that are removals from state court, from 11.5% in 1999 to 17.5% in 2003, though having even been somewhat higher in 2002). Of removed cases, a substantial portion are remanded. *Removal, Remand and Reimbursement*, 87 Marq. L. Rev. at 124 & n.7. It is fair to suspect that even more cases than that would be remanded, if plaintiffs knew that they could obtain their fees for seeking remand. It stands to reason that many plaintiffs do not fully explore the possibility of moving for remand, and do not fully research the arguments that could obtain such a result, because the benefits of such work are often small if a fee award is unlikely.

So, the standard for fee awards, under § 1447(c), will affect the congestion of federal court dockets in at least two material ways. First, a standard calling for fee awards in more cases will deter incorrect removals in many cases (as defendants, contemplating a removal with a small chance of success, will conclude that the cost of a likely fee award outweighs the slim chance of a benefit). And second, a standard calling for more fee awards will cause more plaintiffs to challenge legally-incorrect removals—and to challenge them well—thus removing even more cases from the federal docket without the necessity of lengthy discovery, summary judgment proceedings, and trials. A standard (like the Fifth Circuit's) that calls for fewer fee awards will lead to more docket congestion, as more cases are wrongly removed and more removals go unchallenged.

Moreover, this is the sort of question that calls out for a uniform nationwide rule. The current unclear state of the law helps no one. There are, of course, many litigants and many

lawyers whose practice brings them before several Circuits and a multitude of District Judges. Those litigants and lawyers ought to be able to know, before undertaking a removal or challenging one, what law governs under § 1447(c).[5]

5. This case is an appropriate one in which to resolve the question.

This case is an appropriate one in which to decide among the various rules applied by the lower courts. However one parses the array of lower court decisions, there is this stark split: some courts deem a reasonable argument in favor of removal to be, in and of itself, a legally sufficient and appropriate reason to deny fees, and other courts do not. That split exists, as has been shown herein, even among District Courts within the same Circuit, in Circuits such as the Ninth and Tenth.

The resolution of this case should answer that precise question: whether the existence of a reasonable argument in favor of removal is a legally sufficient and appropriate reason to deny fees. If it is, then the decision below will be affirmed. If it is not, the decision below must be reversed. Upon reversal, depending on what sort of standard this Court adopts, this Court will be in position either to render a decision on the propriety of fees in this case (if, for instance, the Court adopts a *Piggie Park*-like rule) or at least to remand for further consideration in light of the newly-announced standard or set of factors.

---

[5] Very recent legislation has made more class actions removable. That legislation does not moot the issue here, but rather makes the issue all the more important. Nothing in the new legislation changes the standard for fee awards under § 1447(c). Whether or not this case would hypothetically have been removable under the new standard is irrelevant to the wrongful removal as it actually occurred. Furthermore, the new statute making more cases removable will make it all the more important to deter wrongful removals, to alleviate some pressure from increasingly crowded dockets.

This case would make a better vehicle for review of this question, than would a case arising from the Fifth Circuit. Given the Fifth Circuit's *Christiansburg Garment*-like rule, a District Court in that Circuit will have had no reason to consider whether there is any reason to deny fees other than the existence of a reasonable argument in favor of removal. In this case, by contrast, the District Court's consideration was not similarly constrained; here, the District Court has had a chance to explain any reason it might deem to be a reason for denying fees, and has offered nothing other than the belief that there was a reasonable argument in favor of removal. Therefore this case brings the question that has divided the lower courts, in its purest form and in the posture that is most ready for review.

CONCLUSION

There is plainly a split in the Circuits, and an even wider divergence of law and practice in the District Courts; and the answer to the question presented will have a material impact on the congestion of federal court dockets. For the reasons stated herein, this Court should grant review of the decision below.

Respectfully submitted,

MICHAEL P. MALAKOFF
JAMES M. PIETZ
MALAKOFF, DOYLE,
& FINBERG, P.C.
Frick Bldg;, Ste. 200
Pittsburgh, PA 15219
(412) 281-8400

SAM HELDMAN *
GARDNER, MIDDLEBROOKS
2805 31st St., NW
Washington, DC 20008
(202) 965-8885

* Counsel of Record
for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Dec. 30, 2004]

No. 02-2048

GERALD T. MARTIN and JUANA M. MARTIN,
individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation;
and CENTURY-NATIONAL INSURANCE COMPANY,
a California corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1480-LH)

Before SEYMOUR and BRISCOE, *Circuit Judges*, and PAYNE*, *District Judge*.

SEYMOUR, *Circuit Judge*.

Gerald T. Martin and Juana M. Martin (Martins) sought an award of attorney's fees and expenses pursuant to 28 U.S.C. § 1447(c) from Franklin Capital Corporation and Century-National Insurance Company (defendants) after this court de-

---

* The Honorable James H. Payne, Chief District Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

termined defendants should not have removed the instant action to federal court. The district court denied the Martins' request for fees and expenses, and they appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

In September 1996, the Martins filed a lawsuit against defendants in New Mexico state court. On their behalf and on behalf of all persons similarly situated, the Martins sought damages under state statutory and common law theories for alleged illegalities with respect to automobile financing and insurance contracts they had entered into with defendants. About a month after the Martins filed their complaint, defendants removed the action to federal court based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332 and 1441. The Martins raised no objection to defendants' removal at the time and did not seek remand. Over a year later, and during a hearing before the district court on defendants' motion to dismiss, the Martins first questioned whether the court possessed jurisdiction over the case. The Martins subsequently filed a motion to remand the action to state court for lack of subject matter jurisdiction on the basis that their claims did not meet the $50,000 amount in controversy requirement for diversity jurisdiction.[1]

In opposition to the Martins' motion, defendants argued variously the amount in controversy requirement was satisfied because the Martins' complaint sought punitive damages of more than $50,000 in the aggregate; sought attorney's fees of more than $50,000 in the aggregate; and sought monetary

[1] This action was filed in state court on September 13, 1996. At the time, 28 U.S.C. § 1332 required the amount in controversy to exceed $50,000. The amount in controversy requirement has since been increased to $75,000 and applies to cases filed on or after January 17, 1997. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (Oct. 19, 1996).

relief for the named plaintiffs for more than $50,000. The district court agreed with defendants and denied the Martins' motion to remand, finding "[t]he allegations of the complaint and the contents of [defendants'] notice of removal demonstrate the requisite $50,000 amount in controversy." Aplt. App. at 263.

The Martins requested the district court certify its order denying remand so they could seek interlocutory appeal under 28 U.S.C. § 1292(b), which the court denied. The Martins subsequently petitioned the court to grant judgment against them in order to permit an immediate appeal on the question of jurisdiction. The district court granted the Martins' voluntary dismissal with prejudice and they filed an appeal.

In *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001) *(Martin I)*, we reversed the district court's ruling. In the course of our analysis, we rejected defendants' argument that "the punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy" for jurisdictional purposes. *Id.* at 1291. We also rejected defendants' contentions that an aggregation of attorney's fees or the amount of relief requested by the Martins as class representatives satisfied the amount in controversy requirement. *Id.* at 1291, 1293. Accordingly, we remanded with directions that the case be sent back to state court. *Id.* at 1294.

Upon returning to the district court, the Martins moved for an award of attorney's fees and expenses pursuant to § 1447 (c), which grants the district court discretion to award attorney's fees incurred as a result of removal when a case is remanded. The district court denied the Martins' request, determining that at the time defendants removed the case to federal court, they had objectively reasonable legal grounds to believe removal was proper. The Martins challenge on appeal the district court's denial of attorney's fees and expenses.

II

The language of § 1447(c) directs that the award of attorney's fees rests squarely within the discretion of the district court when a remand is ordered. *See* § 1447(c) ("An order remanding the case *may* require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." (emphasis added)). Given our decision in *Martin I* that removal was improper in this case, the district court had discretion to award attorney's fees to the Martins if it believed fees were appropriate. The district court determined defendants possessed objectively reasonable grounds to believe removal was proper and therefore declined to award fees to the Martins. We review that decision for abuse of discretion. *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 322 (10th Cir. 1997); *Daleske v. Fairfield Cmtys, Inc.*, 17 F.3d 321, 323 (10th Cir. 1994). We review *de novo* the district court's legal analysis underlying its decision. *Daleske*, 17 F.3d at 323.

In challenging the district court's ruling, the Martins assert that in a case where a defendant's removal to federal court serves as what the Martins characterize as "test litigation" regarding the existence of federal jurisdiction, and jurisdiction is subsequently found to be lacking, fees should be awarded to the plaintiff as a matter of course. They also assert the district court did not properly apply the standard articulated by our court in *Suder* and *Daleske*. Building upon their test litigation argument, they contend the district court should have adhered to what they argue is a more "plaintiff-based standard" which they say has been adopted by the Seventh and Ninth Circuits, citing *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000), and *Hofler v. Aetna US Healthcare*

of Ca., 296 F.3d 764 (9th Cir. 2002).[2] Under this approach, the Martins urge that attorney's fees should be awarded when removal is deemed improper, irrespective of whether the defendant had a legitimate or objective basis for believing in the propriety of removal. We are not persuaded.

As we have recognized:

> In deciding whether to award costs under § 1447(c), the key factor is the propriety of defendant's removal. The district court does not have to find that the state court action has been removed in bad faith as a prerequisite to awarding attorney fees and costs under § 1447(c).

Excell, Inc., 106 F.3d at 322 (internal citations omitted). On the other hand, attorney's fees may be denied where the defendant "had a fair basis for removing the case." *Daleske*, 17 F.3d at 324.

Other circuits have also recognized that the award of fees under § 1447(c) is left to the wide discretion of the district court once remand is ordered. *See, e.g., Balcorta v. Twentieth Century Fox-Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000) (reviewing for abuse of discretion district court's fee award determination); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000) ("The decision of the district court to award or not to award attorney's fees is reviewed for an abuse of discretion."); *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996) ("a district court has broad discretion and may be flexible in determining whether to require the payment of fees under section 1447(c)"); *Morris v. Bridgestone/*

---

[2] In this context, we note that the Martins' citation to and reliance on *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000), is misplaced. The controversy in *Hotline* did not involve entitlement to fees but focused instead on the appropriate amount of fees awarded. *Id.* at 366-68. *But see Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 987 (7th Cir. 2003) ("provided removal was improper, the plaintiff is *presumptively* entitled to an award of fees").

Firestone, Inc., 985 F.2d 238, 240 (6th Cir. 1993) (agreeing that "the . . . statute affords a great deal of discretion in fashioning awards of costs and fees") (quotation omitted)); *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992) (statute provides district courts with discretion in how to award costs and fees). While the Seventh Circuit has suggested there is a presumption that fees be awarded to plaintiffs under § 1447(c) upon a finding of improper removal, *see e.g., Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 987 (7th Cir. 2003), "[n]evertheless, the entitlement is not automatic—the presumption is not irrebuttable. . . ." *Id.*[3]

Between these varied expressions regarding § 1447(c), there remains the broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate. Indeed, most courts do not impose fees when the defendant had a legitimate ground for seeking removal. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107. 41[3][a][ii] (3d ed. 1997); *see also* 14C CHARLES ALAN

[3]Contrary to the Martins' assertion, we are not convinced the Ninth Circuit follows a similar approach. In *Balcorta v. Twentieth Century Fox-Film Corp.*, 208 F.3d 1102 (9th Cir. 2000), the court made clear that "it may be within the discretion of the district court not to award fees" when a defendant's attempt to remove the action had a sufficient basis in the law, and also that the circuit's "case law does permit an award of fees when a defendant's removal, while 'fairly supportable,' was wrong as a matter of law." *Id.* at 1106 n.6; *see also Hofler v. Aetna US Healthcare of Ca.*, 296 F.3d 764, 770 (9th Cir. 2002) ("fees are proper when removal is wrong as a matter of law, even though the defendant's position may be 'fairly supportable'"). In other words, in the Ninth Circuit, as in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees. The decision is then reviewed for an abuse of discretion.

WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739 (3d ed. 1998) (noting award of fees is at discretion of district court, and fees may be denied "when there are reasons to believe that the removability of the case was plausible").

The Martins incorrectly claim the district court employed a standard other than that required by our circuit. In accordance with *Suder* and *Daleske*, the district court recognized that a plaintiff is not automatically entitled to attorney's fees simply because removal was ultimately determined to be improper. Instead, relying on *Valdes*, 199 F.3d at 292, it determined it should "evaluate the merits of Defendants' removal action at the time it was filed." Aplt. App. at 344; *see also Valdes*, 199 F.3d at 293 ("the question we consider in applying § 1447(c) is whether the defendant had objectively reasonable grounds to believe the removal was legally proper"). This characterization accords with our decision in *Daleske*, in which we upheld a denial of fees where the defendant "had a fair basis for removing the case." 17 F.3d at 324. Upon determining that defendants' removal position was objectively reasonable at the time they sought removal, the court exercised its discretion and declined to award fees to the Martins. As we discuss in more depth below, we find no fault in the district court's articulation or implementation of the fee award standard.

III

Having determined the district court employed the proper standard in deciding whether to award fees to the Martins, we now examine whether the court correctly concluded that when defendants removed the underlying action in October 1996, they had a legitimate basis to believe the federal court could exercise jurisdiction over the case. *Valdes*, 199 F.3d at 293; *Daleske*, 17 F.3d at 325. While a close question, we agree with the district court that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they "had objectively reasonable

grounds to believe the removal was legally proper."[4] Aplt. App. at 347.

In support of their motion to remove to federal court, defendants contended that "punitive damage claims in a class action suit may be considered in the aggregate when determining the amount in controversy." *Id.* at 3. In making this argument, defendants relied on case law from the Fifth and Eleventh Circuits, which at the time indicated that aggregation of punitive damages in a class action suit was permissible to reach the amount in controversy requirement for diversity jurisdiction. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996); *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). Although these cases were subsequently severely limited and overruled by their respective circuits, *see H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998), *Tapscott* and *Allen* represented viable authority in October 1996 upon which defendants could rely to support their petition for removal.

As noted above, in *Martin I* we rejected defendants' argument regarding aggregating punitive damages. We commented on the demise of *Tapscott* and *Allen*, and we noted that "all of the circuits considering the issue *now* hold that punitive damages cannot be aggregated and attributed in total to each member of a putative class for purposes of satisfying the amount-in-controversy requirement of diversity jurisdiction." *Martin I*, 251 F.3d at 1292 (emphasis added) (citing *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264-65

[4] Because we agree with the district court's conclusion that defendants' removal to federal court on an aggregation of punitive damages theory was objectively reasonable, as well as with the court's subsequent refusal to award fees to the Martins on the basis of that argument, we need not address defendants' remaining positions supporting removal.

(11th Cir. 2000); *Ard*, 138 F.3d at 600-02; *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996)). Based on this precedent, we joined these other circuits in concluding that the amount in controversy requirement in a class action suit may not be satisfied by aggregating punitive damages. *Id.* at 1293.

On remand, the district court emphasized that we relied primarily on case law post-dating defendants' October 1996 removal to federal court in reversing the district court's earlier ruling. Likewise, the court pointed out that the Fifth and Eleventh Circuit rulings undermining *Allen* and *Tapscott* were decided several years after the removal action in this case. Finally, the court took special notice of our comment that we had not previously "ruled directly on [the] matter" of aggregating punitive damages. Aplt. App. 345 (quoting *Martin I*, 251 F.3d at 1292). The district court stated accordingly that

> [b]ased on the language contained in this Tenth Circuit, and given the history of the law in this area, I am unable to conclude that the removal was improper *ab initio* . . . . It appears that the Tenth Circuit remanded [this case] largely based on changes in the law during the time between the removal (1996), and its opinion (2001).

Id. at 345-46. The district court did not err in this ruling.

We acknowledge that in October 1996, several district courts, including some in our own circuit, had rejected the approach adopted in *Tapscott* and *Allen*. *See, e.g., Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 222-23 (S.D.N.Y. 1996); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 297-99, 301-02 (D.N.J. 1996); *Asten v. Southwestern Bell Tel. Co.*, 914 F. Supp. 430, 433-34 (D. Kan. 1996); *Visintine v. Saab Auto. A.B.*, 891 F. Supp. 496, 498-99 (E.D. Mo. 1995); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541-42 (D.

Colo. 1993). Moreover, the courts in both *Tapscott* and *Allen* sidestepped circuit precedent which, according to *H&D Tire* and *Cohen*, should have guided them to conclude it was not permissible to aggregate punitive damages in a class action suit to establish diversity jurisdiction. *See H&D Tire*, 227 F.3d at 330; *Cohen*, 204 F.3d at 1076. In *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978), a class action, the court had held that claims of individual class members "cannot be aggregated for the purpose of satisfying this jurisdictional predicate." *Id.* at 594. While the court did not specifically discuss the punitive damages claim of one million dollars, it reversed the removal decision because the complaint failed to allege the number of class members, an unnecessary result if punitive damages could be aggregated.[5] *Id.* at 595.

Oddly enough, *Lindsey* was cited in both *Tapscott* and *Allen*, although neither decision devoted much discussion to it. *See Tapscott*, 77 F.3d at 1357 n.9 (referencing *Lindsey* for general proposition that "each putative class member must satisfy" jurisdictional requirements); *Allen*, 63 F.3d at 1332 n.9 (noting disagreement among district courts in Fifth Circuit on whether joint claims of punitive damages constituted common and undivided interests allowing for aggregation). When the Fifth and Eleventh Circuits revisited the *Allen* and *Tapscott* decisions, both circuit courts referred to the pre-existing and conflicting precedent of *Lindsey* and determined it controlled the question of whether punitive damages could

[5] *Lindsey v. Alabama Tel. Co.*, 576 F.3d 593 (5th Cir. 1978), was decided before the Fifth Circuit was divided into two circuits on October 1, 1981, resulting in the creation of the Eleventh Circuit. The Eleventh Circuit subsequently held that decisions handed down by the Fifth Circuit prior to September 30, 1981, would be binding precedent in the Eleventh Circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). Therefore, *Lindsey* serves as binding precedent for both the Fifth and Eleventh Circuits.

be aggregated. *See H&D Tire*, 227 F.3d at 330; *Cohen*, 204 F.3d at 1076. Nevertheless, that the courts in both *Tapscott* and *Allen* cited *Lindsey* gives weight to the argument that the answer to whether punitive damages could be aggregated in the Fifth and Eleventh Circuits was in flux. While *Lindsey*'s precedent ultimately prevailed, the *Tapscott* and *Allen* courts' seeming rejection of *Lindsey*'s punitive damages analysis created a legitimate basis on which defendants could rely to support their aggregation argument.

In challenging defendants' contentions that there existed legitimate grounds to believe punitive damages could be aggregated in order to satisfy the amount in controversy requirement, the Martins assert the Supreme Court in *Snyder v. Harris*, 394 U.S. 332 (1969), and this circuit in *Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503 (10th Cir. 1991), made clear that any argument regarding the aggregation of punitive damages in a class action case would be rejected outright. We disagree. In *Snyder*, the Supreme Court reiterated the general rule "that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." 394 U.S. at 335. But the Court noted an exception to this non-aggregation rule, stating in part that aggregation would be permitted "in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* Hence, under *Snyder*, there was room to argue that the nature of a punitive damage claim in a class action suit was common and undivided, therefore possibly permitting aggregation.

The courts in *Tapscott* and *Allen* tested the *Snyder* exception and held that punitive damage claims could be deemed common and undivided based on the characterization of punitive damages in the two states in those respective cases. Therefore they could be aggregated for the purposes of meeting the amount in controversy requirement. *Tapscott*,

77 F.3d at 1357-59; *Allen*, 63 F.3d at 1334-35. So holding, the courts reached a supportable conclusion that the aggregation of punitive damages was permitted under the *Snyder* exception.

In *Justice*, our court acknowledged *Snyder*'s general rule barring aggregating claims of multiple plaintiffs where those claims are separate and distinct, rather than common and undivided. 927 F.2d at 504. However, we did not devote any further discussion to whether the aggregation of common claims was permitted. Rather, we focused on "whether state law or federal common law determines if the claims are separate and independent." *Id.* We noted that

> federal law is used to determine whether the claims are separate and independent, and state law determines the nature of the claims to which the federal law test is applied. In other words, state law determines the character of plaintiff's claim, and federal law determines whether that claim meets the standard of Section 1441(c).

Id. (internal citation omitted).[6] We then examined the nature

[6]*See also* 14C CHARLES ALAN WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE § 3724 (3d ed. 1998). The Martins vigorously assert that because we had previously recognized in *Justice* that federal law determines whether claims are separate and independent, defendants' reliance on *Tapscott* and *Allen* was unwarranted. However, as we also recognized in *Justice*, state law often plays a role in determining whether a case can be removed. Professor Wright begins his discussion by stating *"[b]oth* federal and state law play a part in determining the removability of a case under Section 1441(c)," noting that "state law determines the substantive character of the plaintiff's claim." *Id.* For example, "state law is relevant to the question of whether an alleged liability is joint and federal law controls whether a case concerning joint liability is removable." *Id.* (emphasis added); *see also, e.g., Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1280-81 (11th Cir. 2001) (referring to state law to determine nature of punitive damages and then holding state characterization does not allow for aggregation); *Spriggs v. Wolf*, 496 F. Supp. 990, 991 (W.D. Okla. 1979) (court looked to Oklahoma law to determine if garnishment proceeding was separate from other claims asserted in action); *Anderson v. Union Pac. R.R. Co.*, 200 F. Supp. 465, 467 (D. Kan. 1962) (local law determines whether claim is joint or several in character).

of the plaintiffs' claims, determined they were in fact separate and independent, and held they satisfied the amount in controversy requirement without aggregation. *Id.* at 504-05. Contrary to the Martins' assertions, neither *Snyder* nor *Justice* directly addressed the specific question of whether a punitive damage claim in a class action suit may be aggregated for jurisdictional purposes.

In sum, in October 1996, when defendants in the instant case removed this action to federal court, they possessed legitimate grounds upon which to believe punitive damage claims could be aggregated in a class action suit in order to satisfy the amount in controversy requirement. We consequently agree with the district court that based on the law existing at that time, defendants possessed "objectively reasonable grounds to believe the removal was legally proper." Aplt. App. at 347. Given the uncertain state of the law on aggregation of punitive damages when defendants removed this action, we cannot say the district court abused its discretion in declining to award fees to the Martins.

We AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN,
Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation,
and CENTURY-NATIONAL INSURANCE COMPANY,
a California Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for an Award of Attorney's Fees and Expenses Under 28 U.S.C. § 1447 (Docket No. 68). Specifically, Plaintiffs seek approximately $60,000 in fees and expenses, allegedly necessitated by Defendants' improper removal. The Court, having read the pleadings of both parties and being fully advised in the premises, finds that Plaintiffs' motion shall be denied.

Factual Background

This lawsuit was originally filed in state court on September 13, 1996. On October 26 1996, on grounds of diversity of citizenship jurisdiction, Defendant Century-National Insurance Company ("Century") removed this case to federal court with the consent of Franklin Capital Corporation ("Franklin") (hereinafter jointly referred to as "Defendants"). It was not until November 25, 1997 that Martins first raised the issue of this Court's jurisdiction. On February 3, 1998, the Martins

filed a motion to remand to state court for lack of subject matter jurisdiction, on the basis that their claims did not meet the $50,000 amount-in-controversy requirement for diversity jurisdiction.[1] On May 21, 1998, an order was entered denying that motion. On March 30, 1999, at the Martin's request judgment was entered against them, after their request for an interlocutory appeal was denied on November 6, 1998.

A notice of appeal was filed on April 27, 1999. The Tenth Circuit entered its opinion more than two years later, on May 29, 2001. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001). That opinion reversed this Count, concluding that this Court lacked subject matter jurisdiction, and remanded the case, with directions to remand this action to state court. The Tenth Circuit concluded that Defendants had failed to affirmatively establish the requisite jurisdictional amount, on the face of the petition or in the removal notice. That Court specifically rejected Defendants' contention, as contained in both the removal notice and on appeal, that jurisdiction was satisfied because the attorneys fees and the punitive damages claimed by the entire class could be aggregated and attributed to the Martins for purposes of determining the amount in controversy, and that so long as the Martins, as class representatives, met the jurisdictional amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims.

The Martins argue that, although Defendants' notice of removal did not rise to the level of bad faith or frivolousness, that their legal theories in support of removal were against the vast weight of legal authorities and were not well taken by the Tenth Circuit under "well established legal precepts that were well known to Defendants at all material times." (Ptfs' Mem. at 2). This is the basis for their fee request.

---

[1] At the time this action was filed in state court (September 13, 1996). 28 U.S.C. § 1332 required the amount its controversy to exceed $50,000.

Applicable Standards

As amended in 1988, 28 U.S.C. § 1447(c) provides in pertinent part that an order remanding the case may require payment of just costs and actual expenses, including attorneys fees, incurred as a result of the removal. *See Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994), *cert. denied*, 511 U.S. 1082 (1994) (noting amendment deleted requirement that case be removed improvidently and authorized award of attorneys fees). Such an award is discretionary with the Court, and bad faith need not be shown. *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997) (*citing Daleske*, 17 F.3d at 324-25). The "propriety of defendant's removal continues to be central in determining whether to impose fees." *Deleske*, 17 F.3d at 324 (*quotation omitted*). The Tenth Circuit is one of the circuits that requires a showing that the removal was improper *ab initio*.[2] *Suder*, 116 F.3d at 1352; *Daleske* 17 F.3d at 324. Subsequent to *Daleske*, the *Suder* court pointed out that this standard is much different than colorable. "A removal is proper only if it is legitimate." *Suder*, 116 F.3d at 1352.

According to these standards, I must determine whether removal was improper *i.e.*, illegitimate, at the beginning, or in the first place, which I construe as the time that the notice of removal was filed, *i.e.*, on October 26, 1996. I must objectively evaluate the merits of Defendants' removal action at the time it was filed. *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000). As noted above, the legal theory underlying this removal was that the attorneys fees and punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy. Further, Defendants maintained that so long as the Martins, as class representatives, met the jurisdictional

[2] This means "from the beginning." BLACK'S LAW DICTIONARY 6 (6th Ed. 1990).

amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims.

Aggregation of Punitive Damages

It is important to bear in mind that the notice of removal was filed in October of 1996. In holding, apparently for the first time, that punitive damages may *not* ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction, the Tenth Circuit relied on language of the 1998 *Leonhardt* case,[3] as well as on other post-1996 case law from other circuits. The Tenth Circuit relied especially on the reasoning of Second Circuit case of *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997). *See Martin*, 251 F.3d at 1292.

In its opinion, the Tenth Circuit noted that two cases upon which Defendants had relied had been disapproved by the circuits that decided them.[4] *Id.* The circuit opinions disapproving and limiting Defendants' relied upon case law were filed in 2000 in the Eleventh Circuit and in 1998 at the Fifth Circuit.

> At least one commentator has summarized the history of this development of law in this area:
>
> There *currently* is agreement that punitive damages claims are not by nature common and undivided, making aggregation possible only if putative class members are suing to enforce a single title or right in which they have a common and undivided interest.

[3] *Leonhardt v.Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998).

[4] These two cases are *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) disavowed *Tapscott*, and *Allen* was disavowed by *Ard v. Transcont'l Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998). *See also H&D Tire and Auto Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent).

Several years ago, the Fifth and Eleventh Circuits suggested that punitive damages claims ordinarily may be aggregated. *See Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), 96 Fed Lit 139; *Allen v. R&H Oil Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). They have since explained that aggregation is not the rule. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *Ard v. Transcontinental Pipe Line Corp.*, 138 F.3d 596 (5th Cir. 1998).

In addition to the Ninth Circuits,[5] the Second, Seventh, Eighth and Tenth Circuits reject aggregation as the usual rule. *See Crawford v. R. Hoffman-LaRoche Ltd.*, 2001 WL 1160354 (8th Cir. 2001); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *In re Brand Names Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997); *Gilman v BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997), 97 Fed Lit 98. Only if putative class members are suing to enforce a single title or right in which they have a common interest is aggregation possible

16 NO. 11 FED. LITIGATOR 270 (2001) (emphasis added).

I have carefully reviewed the pertinent caselaw and agree with this summary of it.

The Tenth Circuit noted in its opinion that it had "not ruled directly on this matter". *Martin*, 251 F.3d at 1292. Further, it indicated that it would "*now hold*, in light of the language in *Leonhardt* and the analysis of our sister circuits, that punitive damages may not ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction." *Martin*, 251 F.3d at 1292 (emphasis added).

---

[5] Here this article is making reference to the case of *In re Ford Motor Company/Citibank (South Dakota), N.A. v. Ford Motor Company*, 264 F.3d 952 (9th Cir. 2001).

Based on the language contained in this Tenth Circuit, and given the history of the law in this area, I am unable to conclude that the removal was improper *ab initio*. As noted by the Tenth Circuit, as grounds for removal, Defendants relied on the two cases of *Tapscott* and *Allen*, which were not abrogated until the years 2000 and 1998 respectively. Obviously this Court did not consider the removal improper at that time, given its refusal to remand the case to state court. Although the removal was subsequently remanded by the Tenth Circuit, I conclude that, at the time of the removal, it was not improper. It appears that the Tenth Circuit remanded largely based on changes in the law during the time between the removal (1996), and its opinion (2001).

Aggregation of Attorney Fees -

In analyzing the aggregation of attorney fees issue, the Tenth Circuit noted that courts "have generally held, under the same rationale applied to preclude the aggregation of punitive damages, that attorneys fees cannot be aggregated for purposes of diversity jurisdiction." *Martin*, 251 F.3d at 1293. Once again the Tenth Circuit relied primarily upon post-1996 case law for its conclusion that attorney fees cannot be aggregated.[6] The Tenth Circuit's acknowledgment that courts had applied the same rationale to the aggregation of attorney fees as has been applied to the aggregation of punitive damages, compels application of the same rationale to my analysis. As above, I must conclude that Defendants' removal on this basis was not improper *ab initio*.

Conclusion

I am fully cognizant of the fact that, in its May 2001 decision, the Tenth Circuit held that this matter was improp-

---

[6] This case *Morrison v. Allstate Indem. Co.* 228 F.3d 1255, 1264-65 (10th Cir. 2000). The *Martin* opinion did also mention a 1982 Ninth Circuit case, *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982).

erly removed to federal court, and ordered remand of the case to state court. The fact that, more than four years later, removal was determined to be improper does not automatically entitle the plaintiff to attorney fees however. *See Hale v. Masstersoft International Pty. Ltd.*, 93 F. Supp.2d 1108, 1114 (D.Colo. 2000), *citing Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000).[7] Rather, the court must objectively evaluate the merits of the Defendants' removal action at the time it was filed. *Id.* at 292-93.

As noted in *Moore's Federal Practice*, "as a practical matter, most courts refuse to award the plaintiff costs and fees when the defendant had a legitimate or colorable legal ground for removal . . ." 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.41[3][A](3d ed. 1997). *See Daleske*, 17 F.3d at 325 (declining to award fees on conclusion that defendant had legitimate basis for believing district court had jurisdiction). Here, for the reasons above stated, I conclude than in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area, as discussed above. Although the Tenth Circuit has now declared that Defendants' underlying reasons for removal are improper, that conclusion does not require this Court to award attorney's fees to Plaintiffs. Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees and that Plaintiffs' motion will be dated.

[7] *Valdes* stated: "We evaluate the objective merits of removal at the time of removal, irrespective of the fact that is might ultimately be determined that the removal was improper." *Valdes*, 199 F.3d at 293.

WHEREFORE for the reasons stated herein. Plaintiffs' Motion for an Award of Attorney's Fees and Expenses Under 28 U.S.C. § 1447 (Docket No. 68) is denied.

IT IS SO ORDERED.

/s/ _____
U.S. District Court Judge